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Supreme Court of the United States

OCTOBER TERM, 1935

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,

vs.

STATE OF WASHINGTON, Appellee.

Appeal From the Supreme Court of the State of Washington

Brief for Appellant

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December, 1935

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Brief for Appellant

STATEMENT OF THE CASE

This is an action by appellee to recover from appellant the tax of 1½% of gross *intrastate* revenue accrued August to December, 1933, inclusive, imposed by Chapter 191, Laws of 1933, for the privilege of doing *intrastate* railway business in that period.

Sec. 2 describes business subject to the tax, distributed into five principal classifications, viz.: extractive

function; manufacturing and producing function; wholesaling and jobbing; retail distribution; performing and rendering services.

Par. 2 (2) provides that from the first day of August, 1933, and until the 31st day of July, 1935, there is hereby levied "an annual tax or excise for the privilege of engaging in business activities * * * measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be * * *."

Sec. 2 imposes a tax of varying percentages of gross income for the several kinds of business. Sec. 2 (2) (e) is as follows:

"Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

III. Steam railways: one and one-half per cent."

Sec. 3 provides:

"If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Sec. 6 requires payment of the tax in monthly installments and reports upon forms prescribed by the Tax Commission.

Sec. 7 requires an annual verified return for the entire year, accompanied by payment of the balance, if any, of the tax due for the year. Sec. 9, that the taxpayer shall keep a record of gross income for five years. Sec. 10, that if the taxpayer fails to make return the Commission shall make the assessment, adding a penalty of 10% and an additional penalty of 1% per month. Sec. 15, that if any tax or penalty be not paid within fifteen days after it is due, the Commission shall issue a warrant to the Sheriff commanding him to levy upon and sell real and personal property of the taxpayer sufficient to pay the amount, together with a penalty of 1% for each thirty days from date of the warrant. Sec. 16, that the tax and penalties shall be a debt due the State of Washington collectible by suit. Sec. 17, that any person may be enjoined from engaging or continuing in any business until the tax is paid. Sec. 23, that it shall be unlawful to fail or refuse to obtain the license, or fail or refuse to make a return, or to make any false return, etc. Any person violating any of the provisions of the section shall be guilty of a gross misdemeanor.

Appellant made no return, paid no tax, and received no license. Hence this suit.

There is no question as to the nature of the tax. It is strictly an excise for the privilege of doing intrastate business as distinguished from a property tax. *State v. Yelle*, 174 W. 402.

The trial court made findings of fact and concluded that the act, as applied to appellant, violates the commerce and due process clauses of the Constitution of the United States. Judgment of dismissal was entered. The State Supreme Court reversed on questions of law, holding that, on the facts found, the act violates neither of said clauses of the constitution.

The facts found may be summarized as follows:

Appellant's railroad extends from a point on Lake Superior, in Wisconsin, through the intervening states, to Puget Sound into and through twenty-three counties of Washington. It is a common carrier by railroad of both intrastate and interstate commerce subject to state and national regulatory laws. Appellant's intrastate business and interstate business are inseparably commingled and mutually dependent. For the year 1932 the gross freight revenue from business in Washington was $10,570,609, of which $5,497,482 was from intrastate business and $5,073,127 from interstate business. The local net ton miles in 1932

were 326,000,000 and the interstate were 427,000,000. For the week March 25 to 31, 1932, a representative period, the intrastate revenue net ton miles were 6,824,237 and interstate 7,601,845. Of the intrastate revenue net ton miles 3,022,719 were eastbound and 3,801,518 westbound; of the interstate revenue net ton miles, 5,175,941 were eastbound and 2,425,904 were westbound. Both intrastate business and interstate business, eastbound and westbound were carried over the same lines of railroad, in the same trains, by means of the same employes, and with the same facilities. It is not possible, practically and economically, or at all, to carry the interstate freight separately from the intrastate freight in different trains or by means of different facilities and employes. Finding XV, Rec. 47. Similar facts are found as to passenger traffic. Id. Rec. 48. If appellant should abandon its local freight business and continue to do interstate freight business, it would reduce its freight expenses approximately $1,471,623 per annum, but would lose its entire gross revenue from local freight business of $5,497,482. The same interstate passenger service would have to be rendered even if appellant did no intrastate passenger business. Therefore, the expense could not be reduced and the entire revenue of $379,715.00 from intrastate passenger business would be lost.

The result of abandoning local business while continuing interstate business is summarized in Finding XVI, Rec. 49, as follows:

Total Operating Expenses (1932)	$12,336,818
Reduction by abandoning intrastate freight business	1,471,623
Expense of interstate business if local freight business be abandoned	$10,865,195
Total interstate revenue	6,231,366
Loss on interstate business	$ 4,633,829
Ad valorem taxes	2,464,967
Loss including taxes	$ 7,098,796

Therefore, the Superior Court found that appellant's interstate business is dependent upon its intrastate business, and appellant could not, as a practical matter, abandon the local business and continue the interstate business. If it should do so the result would be insolvency within a short period and destruction of the instrumentality of interstate commerce and value of appellant's property. Other details are stated in Finding XVII, Rec. 49. The court finds that appellant's railroad is well located, economically managed, serves all but one of the principal cities and towns of Washington, and its continued operation in intrastate business is essential to the people of the state. (Finding XVIII, Rec. 50.)

The Superior Court held that appellant, a common carrier by railroad subject to the provisions of the

State Public Service Commission Law, Rem. Rev. St. Chap. 1, Title 72, and as well to the acts of congress regulating interstate commerce, could not, as a matter of law, retire from local business while continuing to transact interstate business. It therefore concluded, as matter of fact as well as of law, that the tax, ostensibly for the privilege of doing local business only, is, in reality, and in practical operation and effect, a tax for and condition of the right to do *both* interstate and intrastate business.

The Superior Court made detailed findings of revenue and expenses of doing intrastate business for the year 1933. Findings V to XIV, Rec. 34-45.

Finding XII, Rec. 43, summarizes the facts as follows:

"Operating Revenues (intrastate)	$5,271,893	
Credit account mail and express	221,359	
Total		$5,493,252.00
Operating Expenses	$4,796,440	
Taxes	889,319	
Total		5,685,759.00
Deficit		192,507.00
Occupation tax, Aug.-Dec., 1933 (if valid)		36,116.22
Total deficit		$ 228,623.22"

The occupation tax, it will be noted, is computed for only five months. The monthly average is $7,-

228.00. As the other figures are for a full year, the occupation tax for a full year should be used. At $7,228 per month the amount for the other seven months is $50,596, by which the loss of $228,623.22 should be increased, or $279,219.22 as the deficit from appellant's intrastate railway business in Washington for the year 1933. This computation does not include anything for return on value of the property. Finding XIV, Rec. 45, relates to capital expense, etc. Interest on appellant's funded debt applicable to operating property for 1933 was $7,448,337, of which 25.09%, or $1,868,788, is assignable to lines in Washington. The amount chargeable to the intrastate business is $786,531, which the court finds "is for hire of capital and is an expense of operation and must be taken into consideration in determining the expense of defendant's intrastate business in Washington." The assessed value of the operating property in Washington for 1933 was $100,450,000, of which $42,277,195 is assignable to intrastate business and interest at 6% is $2,536,632. By state statute the assessed value is market value. *N. P. v. State*, 84 W. 510. The cost of reproduction new less depreciation of appellant's operating property in Washington, as found by the Interstate Commerce Commission, in Volume 25 of its Valuation Reports, plus cost of net additions and betterments to December 31, 1933, is

$167,437,700, of which $70,470,844 is assignable to intrastate business and 6% interest is $4,228,251. In addition to funded debt appellant had outstanding capital stock of par value of $248,000,000 of which 25.09% or $62,223,200, would be assignable to Washington. Intrastate assignment on the same basis as bond interest is $26,188,376, of which 6% is $1,571,302. The court did not find what sum is chargeable as capital expense as not even other operating expense was, or was likely to be, earned.

The Superior Court found that years prior to 1932 are not representative of operations in 1932 and subsequent years, and that the probabilities were, at the time of the trial, that results in 1934 and 1935 would not be more favorable to the intrastate business than for the year 1933. Finding V, Rec. 34.

Finding XVII, Rec. 50, is that appellant cannot increase many of its local rates because of competition of other transportation agencies, and for economic reasons. Under the state law, it cannot do so without consent of the Department of Public Works. Appellant has heretofore applied for an increase of local rates but the application was denied by the Department by the order attached to the answer as Exhibit "C" and made a part of the finding. The court finds that appellant "has done all it can do to

increase its (local) revenue, but is unable to do so." Exhibit "C" is an order made by the Department in the matter of application for an extension of the increase in freight rates in connection with the order of the Interstate Commerce Commission extending the increases allowed in Ex Parte 103. The Department denied the increase upon findings, in substance, that to do so would result in discrimination, in violation of state law; and because "it is a matter of common knowledge that the present level of rail rates is too high to permit freedom of movement by rail." To extend the increase, said the Department, would be of no benefit from the standpoint of revenue because it would drive traffic to motor vehicles and other competing agencies, thus resulting in greater loss than gain. Ex. C, Rec. 14.

The final paragraph of Exhibit "C" is as follows:

"We find that a continuance of the effectiveness of the emergency freight rates and charges authorized by our order dated December 17, 1931, to expire March 31, 1933, is not necessary to prevent injury to the interests of the public or to the applicants under existing conditions."

The Supreme Court held that the tax applies only to income from intrastate business. Adopting the findings below, it states that "the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and

it is necessary to make up this loss from the income from interstate business." It states the question for decision as follows:

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company * * * may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss." Rec. 57.

The opinion concedes that a tax imposed as a license to do *both* kinds of business, or a tax levied *directly upon an instrumentality* used in both kinds of business, would be void. But it distinguishes the case at bar from the cases on which appellant relies on the ground that the tax is measured by *gross income* from intrastate business, and "the income from the interstate business may be segregated from the gross income from the intrastate business and (the tax) be valid." It denied the objection, based on unprofitableness of the intrastate business, on the ground

that appellant has "a remedy by application to the Department of Public Works (for an increase) with the right of review by the Superior Court and an appeal to this court." And while, said the court, it appears that such an application has been made and denied, "it does not appear that respondent has exhausted the relief granted by the statute, and until it does so, it cannot be said that even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional." Presumably, the court means that appellant did not take a writ of review to the Superior Court to reverse the Department's order, Ex. C, supra, denying increase of intrastate rates.

Appellant has not brought the evidence to this court because it has assigned no error to the findings of fact, and this court does not review findings approved by both lower courts, except in circumstances not here present. *Fiske v. Kansas*, 274 U. S. 380; *Aetna L. Ins. Co. v. Dunken*, 266 U. S. 389; *Smiley v. Kansas*, 196 U. S. 447; *Page v. Arkansas Natural Gas Co.*, 286 U. S. 269. If an appellate court disposes of a case on findings of fact different from those of the trial court, it must recite the facts so found differently; otherwise it is conclusively presumed that it ac-

cepts those made below. *Chemical Bank v. City*, 160 U. S. 646.

Appellee has caused to be printed a voluminous record of the testimony and exhibits and appellant has paid the cost. This material has no place in the printed record. Appellant asks that the cost thereof be taxed to appellee irrespective of the outcome. Rule 13 (9).

SPECIFICATION OF ERRORS RELIED UPON

(1) The Supreme Court of the State of Washington having found that appellant is engaged in both intrastate commerce and interstate commerce, and having held that as a matter of *law* it cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(2) The Supreme Court of the State of Washington having found that appellant's interstate business and intrastate business in Washington are inextricably commingled, and that as a matter of *fact*, and as a practical matter, appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(3) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by the income from its interstate business, erred in deciding that the tax imposed by Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(4) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business or income earned or received in other states, erred in refusing to hold that Chapter 191, Laws of 1933, violates the due process clause of the 14th Amendment to the Constitution of the United States.

(5) The Supreme Court of the State of Washington, having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business, erred in holding Chapter 191, Laws of 1933, and the tax imposed thereby, does not violate Article I, Section 8, of the Constitution of the United States, for the stated reason that appellant has not exhausted its remedy (by writ of review) to obtain intrastate rate increases, and because that circumstance is immaterial, not supported by, and is contrary to, the facts found in Finding 18.

(6) The Supreme Court of the State of Washington, for each of the reasons contained in the preceding assignments, erred in reversing the judgment of the Superior Court of Thurston County and in rendering judgment in favor of the State of Washington against appellant for the tax imposed by Chapter 191, Laws of 1933, in the sum of $36,116.22.

SUMMARY OF ARGUMENT

I. Chapter 191, Laws of 1933, violates Art. I, Sec. 8, Clause 3 of the Federal Constitution, because appellant cannot (as a matter of state law or of fact), abandon its intrastate business and continue its interstate. Therefore, the tax, while ostensibly for the privilege of doing intrastate business only, is, in practical operation and effect, a tax for the privilege of doing both kinds of business.

II. As appellant's intrastate business is done at a loss, which must be made up from the net proceeds of its interstate business or business done in other states, the tax for the privilege of doing intrastate business, from which appellant cannot withdraw while continuing to do interstate business, violates the commerce clause and due process clause of the 14th Amendment.

III. The tax is not saved because appellant did not seek a court review of the order of the Department of Public Works denying increase of intrastate rates.

ARGUMENT

I. *Appellant cannot abandon its local business while continuing its interstate business.*

While a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid under the commerce clause, must be solely on account of the intrastate business done and the party taxed must be free, in *law* and *fact*, to withdraw from the intrastate business without withdrawing also from the interstate.

In *Pullman Co. v. Adams*, 189 U. S. 420, a Mississippi statute imposed "on each sleeping and palace car company carrying passengers from one point to another within the state $100, and 25c per mile for each mile of railroad track over which the company runs its cars * * * in this state." (p. 421.)

Evidence offered to prove that intrastate business was done at a loss, while the corporation was obliged to engage in such business by the state constitution, was rejected. The court said:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the

states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by Osborne v. Florida, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." (p. 422.)

The act held bad in *Crutcher v. Kentucky*, 141 U. S. 47, required the agent of every express company to pay a small fee and obtain a license to transact *any* business for the company, and file a statement showing that the company had capital of a prescribed amount. The statute, as construed, applied to both interstate and intrastate business. The court said:

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." (p. 58.)

Nor, said the court, is the difficulty at all obviated because the express company,

"as incidental to its main business, (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company." (p. 59.)

Certainly, no one will say that Chapter 191 would be valid if, *in terms*, it prescribed conditions for the

privilege of doing *both* intrastate and interstate business, as in *Crutcher v. Kentucky*. Compare *Cooney v. Mountain States T. Co.*, 294 U. S. 384. (In the *Crutcher* case there was no claim that intrastate business was done at a loss.)

The Supreme Court of Washington, in the instant case, departed from a well established rule which it had previously followed. In *Northern Express Co. v. State*, 76 Wash. 636, it held that an occupation tax of a percentage of gross revenue from intrastate business for the privilege of doing that business, violates the commerce clause, because of the condition that the express company is not free, under state law, to withdraw from the intrastate business while continuing the interstate. Though the case was reversed on rehearing, 80 Wash. 308, that decision is based upon the point that the express company *is* free to withdraw from its intrastate business, following *Pullman Co. v. Adams*, *supra*, and like cases. Again, in *Great Northern v. State*, 147 Wash. 630, a license fee or tax measured by a percentage of authorized capital stock, imposed for the privilege of doing intrastate business, is declared void on the ground that the railway company, a common carrier under the laws of the state, cannot renounce its intrastate business while continuing to transact its interstate, distinguishing the second decision in the

Express case, and following the rule of the Crutcher and Pullman cases. The decision in the case at bar is contrary to the three prior decisions of the state court, in that it is now held that such a tax does not burden interstate commerce even though appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business.

Allen v. Pullman, 191 U. S. 171, considers two acts of the State of Tennessee, one imposing a tax of $500 per car on sleeping car companies doing business in the state, making no distinction between cars used in intrastate commerce and interstate commerce, and the other imposing a flat tax of $3000 on sleeping car companies which carry one or more local passengers in the state. Following *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, the first statute was held invalid because it applied to the privilege of operating the cars in both intrastate and interstate commerce. It was argued by the Pullman Company that the tax of $3000 per annum imposed for carrying one or more local passengers is assessed upon such small proportion of the entire business within the state as to be but a thinly disguised attempt to tax the privilege of engaging in interstate commerce. The court said:

"If the payment of this tax was compulsory upon the company before it could do a carrying business

within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co. v. Adams*, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged, that, under the Constitution of Mississippi, the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of the decision of the Supreme Court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the state constitution." (pp. 181, 182.)

The court states that there is additional reason for holding that the company may transact its interstate business without paying the privilege tax in view of a statute repealing the rule of the common law giving a right of action to any person excluded from any hotel or public means of transportation.

"It follows," said the court, "that a tax imposed upon domestic business, under the circumstances shown, cannot be a burden upon interstate commerce in such sense as will invalidate it." (p. 183.)

Other cases consider inability to withdraw from intrastate business as a practical matter. Thus, in

Western Union v. Kansas, 216 U. S. 1, where a tax of a percentage of the entire capital stock of the Telegraph Company for the privilege of doing intrastate business was held invalid under both the commerce and due process clauses, it was contended that, as the Telegraph Company might withdraw from its local business, it could not complain of the tax. The court observed that the Telegraph Company lawfully entered Kansas long before and was legally there when the act was passed. The state conceded its right to remain if it paid the tax; and only because of its refusal sought the aid of the court to oust the company from its local business.

"The State," said the court, "knows that the telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public —a right lawfully acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the state for many years after Kansas was admitted as a state of the Union." * * * (p. 33.)

Justice White, concurring, said:

"The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair

to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place." (p. 50.)

Findings XVI, XVII and XVIII, (Rec. 49-51), disclose facts to which the language quoted applies with full force.

Barrett v. New York, 232 U. S. 14, holds invalid an ordinance requiring the express company to pay a license fee and give bond for each vehicle, conditioned for safe delivery of packages, on the ground that intrastate packages are handled by the same vehicles and employees that handle interstate packages.

Bowman v. Continental Oil Co., 256 U. S. 642, is a suit by the Oil Company to restrain enforcement of a New Mexico statute imposing a gallonage tax upon sale of gasoline in the state, and a tax of $50 for

each station or place of business at which gasoline was handled and sold in both intrastate and interstate commerce. The gallonage tax was upheld, but the license fee of $50 was held invalid. The court said:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce * * * But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all." (p. 648.)

So here, appellant necessarily transports both kinds of business by means of the same instrumentalities and employees and cannot do otherwise. Therefore, a tax of a percentage of income from intrastate business, or a tax, however measured, for the privilege of doing intrastate business is, in reality, a tax for and condition of the right to do *both* kinds of business. To deny is to contradict the obvious. Compare *Ludwig v. W. U. T. Co.*, 216 U. S. 146.

Interstate Buses v. Holyoke, 273 U. S. 45, was much relied on by appellant, but not noticed by the State Supreme Court. It is a suit by the bus company to restrain enforcement of a statute prohibiting

intrastate operation of buses on the highways without first obtaining a license and certificate of public convenience and necessity. It is emphasized that the conditions were imposed directly upon and made conditions precedent to the *right to operate* as distinguished from an imposition upon the *instrumentality.* The stipulated facts are that the street railway carries passengers in Massachusetts through Holyoke and other towns. The buses transport passengers between Hartford, Connecticut, and Greenfield, Massachusetts, paralleling the route of the street railway in Massachusetts. They carry both local and interstate passengers. The street railway had caused repeated arrests of the bus company's employees for failure to obtain the certificate required for doing local business. The State Supreme Court sustained the statute and its judgment is affirmed by this court. Upon the point here presented, the court used the following language:

"The burden is upon appellant to show that enforcement of the act operates to prejudice the interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no

information as to the number of persons, if any, traveling in interstate commerce on appellant's buses over the part of the route competing with the street railway. It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried *efficiently* and *economically* in buses used exclusively for that purpose, or that appellant's interstate business is *dependent* in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees." (p. 51.)

The Massachusetts act is like Chapter 191 in applying only to local business. The case is in point, even though the statute was upheld, because the decision rests upon failure to prove the facts here found by both courts below. (Finding XV, Rec. 47.) If appellant be correct in saying that the decision in the Holyoke case would have been against the statute had the missing facts been proved, it is controlling here.

Inseparability and mutual dependence of the two kinds of business, as conducted by rail carriers, are, doubtless, matters of common and judicial knowledge. In *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, the court said:

"Intrastate rates and the income from them must play a most important part in maintaining an ade-

quate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent of the passenger receipts. * * * If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. * * * (pp. 585, 586.)

"Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them" * * * (p. 588.)

Again, in *Colorado v. United States*, 271 U. S. 153, 164, the court said:

"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

Obviously, the courts below could not have found the facts otherwise than as they did. The system was provided to handle both kinds of business. Income from intrastate business is essential to its existence as a carrier of interstate commerce. Therefore, to require making of reports, taking out of license and payment of a tax, for the privilege of doing intrastate business from which appellant cannot withdraw, is, in effect, to impose those conditions upon the right to do interstate business. And, as the amount of the

tax is left to the discretion of the state, an essential instrumentality of interstate commerce may be destroyed by the state, if Chapter 191 be valid. Compare *Minnesota v. Barber*, 136 U. S. 313, 324.

Sprout v. South Bend, 277 U. S. 163, invalidates an ordinance prohibiting operation on the city streets of a motor bus unless it be licensed and payment made of a graduated fee based upon seating capacity. Sprout operated between South Bend, Indiana, and Niles, Michigan. He was prosecuted and convicted for violation of the ordinance. Considering whether the ordinance could be sustained as imposing an occupation tax, the court said:

"A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. * * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.*" Citing Barrett v. New York, supra; Bowman v. Continental Oil Co., supra, and other cases. (pp. 170, 171.)

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, sustains an Ohio statute imposing an occupation tax of a percentage of gross intrastate revenue for the privilege of doing intrastate business. It is like

Chapter 191. Although the court quotes the language quoted above from *Sprout v. South Bend*, the opinion of the Supreme Court of Washington in the instant case says of the Ohio case that this court did not invalidate the tax, although

"the facts * * * make it plain that, if the Gas Company had withdrawn from its intrastate business, it would have completely destroyed its interstate business." (Rec. 60.)

The Company brought gas into the state in pipe lines where it was received at pressure reducing stations, thence passed into local distributing systems for delivery to consumers. This court held that interstate transportation ended at the local distributing system. Thereafter the Gas Company did only intrastate business for which the occupation tax was imposed. The interstate and intrastate business was done *consecutively* with *different* facilities; not, as here, *simultaneously* with the *same* facilities. The inseparability of the two kinds of business and dependency of the interstate upon the intrastate was not established in the Ohio case, as here. Nor was there an obligation by state law to do intrastate business as a condition of doing interstate. The Ohio case is not authority for sustaining Chapter 191. It is authority for saying the tax is void.

Cooney v. Mountain States T. & T. Co., 294 U. S. 384, condemns an occupation tax measured by num-

ber of telephone instruments. The act, as construed, imposes the tax for the privilege of doing both local and interstate business, and therefore is invalid. The court repeats the above quotation from *Sprout v. South Bend* and used in the Ohio case, and cites those cases. The Supreme Court of Washington, in the instant case, says of the *Cooney* case that it was there distinctly pointed out that the tax was not laid on revenue derived from monthly rates as distinguished from toll charges, nor imposed with respect either to the nature of the revenue, character of the service, or manner in which the charges are fixed. "From what is there said," said the State Court, "it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different." The language quoted was used by this court in answering an argument made by defendants. It is not authority for saying that the tax would have been sustained had it been measured by gross revenue, even though imposed for the privilege of doing local business from which the telephone company could not withdraw. That point, though decided below, was not considered here. If the State Court is right in its understanding of the *Cooney* case, *Crutcher v. Kentucky*, *Pullman v. Adams*, *Interstate Buses v. Holyoke*, and many like cases were overruled. Certainly, the *Cooney* case would be con-

trary to those and many other cases if the State Court is right. The language quoted by the State Court is immediately followed by the statement that the evidence shows that the same telephones, signaling apparatus, wires, etc., are used in common for both services. It was in this view, said this court, that the District Court held it not feasible to provide separate statewide systems. But, said this court, "apart from that question," the telephone instruments are the means by which customers command service, whether intrastate or interstate. And, so far as the use of the instruments in interstate commerce is not excepted, the tax is laid indiscriminately regardless of their use. This court then said that while the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce, it cannot tax interstate commerce nor the business which constitutes such commerce nor the privilege of engaging in it. And the fact that a portion of the business is intrastate, and therefore taxable, does not justify a tax either upon the interstate business or upon the whole business without discrimination. "There are," said this court, "sufficient modes in which the local business may be taxed without the imposition of a tax which covers the entire operation." (p. 393.) Then follows the quoted language from *Sprout v. South Bend, supra.*

Certainly, there is nothing in the preceding language of the opinion to justify the statement that a tax which violates any of the four conditions precedent to validity stated in the *Sprout* case, repeated in the Ohio case and again in the *Cooney* case, (as does Chapter 191), will be sustained. The statement that there are "sufficient (other) modes of taxing the intrastate business," reminds us to say that the Railroad Revenue Act of Washington, Chapter 130, Laws of 1925, provides for taxing railroad property at its value as a *going concern*, including all franchises, rights and privileges, and all property whatsoever, tangible and intangible, used in operating the railroad. Rem. Rev. St. Sec. 11157 (4). This statute has been so construed in *N. P. Ry. Co. v. State*, 84 Wash. 510, and by the District Court for the Eastern District of Washington in *N. P. R. Co. v. Adams County*, 1 Fed. Supp. 163. F. No. V. (Rec. 34), shows that appellant's *system* net income for 1932 was $1,990,389.21 and for 1933 was $5,975,973.63. F. No. II shows that cost of the property in this state was in excess of $100,000,000, and cost of reproduction less depreciation was $167,000,000. F. XIV (C) Rec. 47. Ad valorem taxes in Washington for 1932 were $2,464,967 and for 1933 $2,005,015. F. VI, Rec. 35. This suggests that ad valorem taxation, to say the least, is ample. The value on which those taxes are calcu-

lated includes the franchise and all intangibles, *including the privilege of doing business*, the very same privilege for which appellant is taxed by Chapter 191. Were it otherwise, the railroad would be taxed on the lesser aggregate value of the separate parcels of real and articles of personal property of which it is made up, not as a going concern. Compare *N. P. R. Co. v. State, supra.* This is a "sufficient mode in which the local business may be taxed," and marks the limit of the state's power to tax the business of the interstate transportation system. If this be not so these systems are at the mercy of the several states. If a tax of 1½% of gross revenue may be levied why not 5% or 10%. And if Washington has the power claimed so have the other states. Even before expiration of the period prescribed for Chapter 191 it was superseded by Chapter 180, Laws of 1935, Rem. Rev. St. 8370-36, raising the rate to 3%. *To uphold Chapter 191 will give to the states power of life and death over the interstate transportation system of the United States.* The dissenting opinion below perceives the menace also adverted to by this court in *California v. C. P. R. Co.*, 127 U. S. 1. We submit that state power to tax is *not* power to destroy, as applied to the interstate transportation system. Compare *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563. No such limitless

power pertains to state ad valorem taxation. *G. N. v. Minnesota*, 278 U. S. 503. Why, then, should it be permitted in favor of the far more dangerous and insidious occupation or franchise tax?

Appellee relied below on *Ohio Tax Cases*, 232 U. S. 576. This case is not noticed by the State Supreme Court. There the tax was for the privilege of exercising the corporate franchise granted by the state to a domestic corporation. *Kansas etc. R. Co. v. Bodkin*, 240 U. S. 227, is a similar case. *St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350, also relied on, sustains a *property* tax measured by percentage of the outstanding capital stock, as is recognized in *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450. Therefore, those cases, and others in the same category, are not in point. Besides, the facts here present were not present in those cases. This court has never sustained a statute like Chapter 191 under the circumstances shown by this record.

II. *Intrastate business was done at a loss.*

The answer alleges, and both courts below have found, that the intrastate business was conducted at a loss which must be made up from net income from interstate business and business done in other states. Findings XII, XVII, Rec. 44, 49, Opinion below, Rec. 57.

Finding XVIII, Rec. 50, is that appellant's railroad is economically managed and its operation in intrastate business is essential to the people of the state. Appellant cannot increase many intrastate rates because of competition of other kinds of transportation, and for economic reasons, nor can it do so under the laws of the state without consent of the Department of Public Service. Appellant has applied for an increase of intrastate rates, but the application was denied for the reasons stated in the Department's findings attached to the answer as Exhibit "C". Appellant, as a practical matter, has been unable to increase its revenue from intrastate business, and the Superior Court finds that it has done all it can but without success. The application for increased rates, denied by the Department's order, was made in connection with the application to the Interstate Commerce Commission in Ex Parte 103, 191 I. C. C. 361, for an extension of the period during which increases were allowed. The application was denied April 7, 1933. Chapter 191 was effective from August 1, 1933, to July 31, 1935, Sec. 2 (2). Necessity for reducing local short haul rates to meet truck competition is common knowledge. *Western Trunk Line Class Rates*, 204 I. C. C. 595, 645, 647. The deficit from intrastate business, exclusive of return on value, including the occupation tax in question, was $279,-

219.22 for 1933. The carrying charge on the investment is no less an operating expense than the cost of labor and materials. *Missouri ex rel. S. W. Bell T. Co. v. P. S. Commission*, 262 U. S. 276; *Rowland v. Boyle*, 244 U. S. 106; *N. P. R. Co. v. North Dakota*, 236 U. S. 585. The obligation of intrastate business under Transportation Act, 1920, to contribute a just proportion of operating expense, including return on value of property, is declared in *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563. Whether the burden on interstate commerce be due to inadequate intrastate rates, excessive taxation, excessive expenditures in the local interest, or otherwise, is without legal significance. Compare *Colorado v. United States*, 271 U. S. 153; *Smyth v. Ames*, 169 U. S. 466. Even ad valorem taxation, (measured by a percentage of gross revenue), is subject to restraint of the commerce clause. *G. N. R. Co. v. Minnesota*, 278 U. S. 503. Why, then, not an occupation tax? In *Southern R. Co. v. Kentucky*, 274 U. S. 76, considering a franchise tax, the court said that "no intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called. *Omaha v. Omaha Water Co.*, 218 U. S. 180." Certainly, no value inheres in the so-called privilege of being com-

pelled to do intrastate business at a loss. And even so, the property is otherwise taxed as a going concern. We have cited *Allen v. Pullman Co.*, 191 U. S. 171 and *Pullman Co. v. Adams*, 189 U. S. 420, to the point that if payment of the privilege tax be compulsory and the burden rests upon receipts from interstate traffic, the tax is void. *Postal T. Co. v. Richmond*, 249 U. S. 252, decides the same point. The court said:

"This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax, results, it is argued, in imposing a burden upon its interstate business, for the reason that the net receipts from its intrastate business are insufficient to pay the tax, and therefore, payment, if compelled, must be made from interstate receipts. If the facts were as thus asserted, it well might be that this tax would be invalid. Pullman v. Adams, 189 U. S. 420; Williams v. Talledega, 226 U. S. 404." (p. 258.)

The state court distinguished the Richmond case on the ground that the legislature has provided a remedy by application to the Department for increased rates, "with right of review by the Superior Court and appeal to this court." Rec. 62. From the findings, said the court, it appears that an application has been made and denied and that another is pending, but it does not appear "that the respondent has exhausted the relief granted by the statute, and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a

burden upon interstate commerce as would justify holding the law unconstitutional." Rec. 62. *Postal T. Co., v. Fremont*, 255 U. S. 124, is cited. The Fremont case is so different in its facts as to lack authority here, even had no application for increased intrastate rates been made and denied. The state court must mean that appellant did not seek review and reversal of the Department's order. Review, of course, would have been unavailing unless the order would have been reversed. Therefore, the state court assumed that it was erroneous, contrary to the well settled rule in this state. *P. S. E. Ry. Co. v. R. R. Commission*, 65 Wash. 75; *State ex rel Tacoma Eastern Ry. Co. v. N. P. R. Co.*, 104 Wash. 405; *North Bend Stage Lines v. Denney*, 153 Wash. 439. The court review is not, as in *Prentis v. Atlantic Coast Line*, 211 U. S. 210, a part of the administrative machinery. The state superior and supreme courts, on writ of review, exercise a purely judicial function. Therefore, after the Department had finally denied the increase of rates applied for, appellant had exhausted its administrative remedy to avoid the uncompensatory rates under which it was compelled to render intrastate service. See *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, where the nature of the remedy by writ of review of the Department's order is determined. Appellant had a right to rely upon the presumption of

validity of the Department's order. It was no more required to establish its invalidity under the state constitution than if a statute were in question. Appellant lost no rights by acting upon the presumption of validity of the Department's order. *Pacific T. & T. Co. v. Kuykendall, supra.* But even so, what would it avail appellant if the loss from diversion of traffic would be greater than the gain from increased intrastate rates? *Florida v. United States*, 282 U. S. 194, holds that an order of the Interstate Commerce Commission under Sec. 13 (4) is void for lack of a finding that increased intrastate rates would, in fact, produce additional income, for, said the court, "the raising of rates does not necessarily increase revenue. It may, in particular localities, reduce revenue instead of increasing it by discouraging patronage." *C. M. & St. P. v. Wisconsin*, 238 U. S. 492, holds invalid under the due process clause a Wisconsin statute prohibiting letting down of an unengaged upper berth in a sleeping car when the lower berth in the same section is occupied. The Wisconsin Supreme Court said that "if compliance with this command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." This court said:

"But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the company may be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. Sweet v. Rechel, 159 U. S. 380." (p. 500.)

As the tax falls on income earned outside the state, there is a violation of the due process clause. Cases cited *post* page 41. Not only is there no fixed right of compensation payable at the time of taking, but compensation will never be received because increased rates, if obtained, will not apply retroactively. Even though the state court's position were otherwise well taken it is untenable under the Wisconsin case. We know of no precedent for sustaining an otherwise unconstitutional tax on the theory that other presumptively valid state action is in truth, unconstitutional, and will be set aside by a state court at the end of protracted and expensive litigation, even if indemnity for past loss would then be received. More especially, where it affirmatively appears that greater loss than gain will result from nominal success.

The state court is on untenable ground in sustaining Chapter 191 for the reason that the tax is measured by a percentage of gross intrastate reve-

nue. The tax is no less a burden on interstate commerce and condition of appellant's right to engage therein because it is measured by a percentage of revenue than if measured by the number of cars, number of miles of track, or number of farm crossings. The states, realizing that a tax of a percentage of both intrastate and interstate revenue for the privilege of doing intrastate business is invalid, resort to the device of measuring the tax by a percentage of revenue from intrastate business only. This measure does not reduce the tax, since the rate per cent is correspondingly increased. The exaction is called a tax for the privilege of doing local business, though it is known to all, and judicially known, that railroads have no option. *W. U. T. Co. v. Kansas, supra.* They cannot retire, as a practical matter, without ruin. In Washington they cannot do so even as a matter of law. The state thus burdens interstate commerce and taxes property beyond its limits by the simple device of calling the exaction a tax for the privilege of doing intrastate business. But this court has often said that a tax will be judged by its practical operation and effect, not by the name or form. *McCallam v. Massachusetts*, 279 U. S. 620; *Dawson v. Kentucky D. & W. Co.*, 255 U. S. 288; *G. H. & S. A. R. Co. v. Texas*, 210 U. S. 217; *W. U. T. Co. v. Kansas*, 216 U. S. 1; *Alpha Port-*

land Cement Co. v. Massachusetts, 268 U. S. 203; *Shaffer v. Carter*, 252 U. S. 37. In the instant case the *reality* is that if appellant withdraws from its intrastate business its interstate business will be destroyed, its property confiscated, and it will be made insolvent. The alternative is to pay a tax for the privilege of rendering service which, as found below, is essential to the people of the state while being given at a loss. Under the facts found, the real nature of the exaction cannot be concealed by calling it a tax for the privilege of doing intrastate business. Compare *Baldwin v. Seelig*, 294 U. S. 511.

As Chapter 191 so clearly violates the commerce clause it is, perhaps, unnecessary to add that, as the tax falls on income of a non-resident not earned in the state, it also violates the 14th Amendment. *W. U. T. Co. v. Kansas, supra; Ludwig v. W. U. T. Co.*, 216 U. S. 146; *Fargo v. Hart*, 193 U. S. 490; *Wallace v. Hines*, 253 U. S. 56; *Alpha Portland Cement Co. v. Massachusetts, supra; Shaffer v. Carter*, 252 U. S. 37.

III. The State Court mentions Chapter 4, Laws of 1933, Initiative Measure 64, limiting the aggregate of ad valorem taxes on real and personal property to 40 mills on the assessed value. It is said that by this law ad valorem taxes have been reduced approxi-

mately one-half. Rec. p. 61. We need not stop to show that the court greatly overestimates the reduction of appellant's ad valorem taxes. *N. P. R. Co. v. Adams County*, 1 Fed. Supp. 163, did more. Why the 40 mill act is mentioned is not apparent. It is something new to intimate that an unconstitutional tax should be sustained because the state has not imposed a constitutional tax for as much as it might. Initiative 64 is a general law applying to all real and personal property from which appellant received no special benefit. *Denny v. Wooster*, 175 Wash. 272. It was strengthened, the limit still further reduced, and re-enacted as Initiative 94, Chapter 2, Laws of 1935, Rem. Rev. St. Sec. 11238-1a. *Love v. King County*, 44 Pac. (2) 175. That the people of Washington, menaced by ever mounting delinquencies of ad valorem taxes which they could not pay, took the law into their own hands, may be inferred from enactment of these measures and from acts offering a premium for payment of delinquent taxes. Chapter 53, Laws 1933; Chapter 166, Laws 1935; *Vance Lbr. Co. v. King County*, 84 Wash. Dec. 330, Nov. 13, 1935. But the railroads were not specially benefited by the 40 mill limit. Bearing in mind that railroads are subject to ad valorem taxation at their value as an entity and going concern (including the franchise to do business) whereas other busi-

nesses, except telegraph, are not so valued, the 40 mill limit laws cannot reasonably be invoked as a reason why an otherwise unconstitutional tax for the privilege of doing intrastate railway business should be sustained.

Appellant submits that the judgment of the Supreme Court of the State of Washington is erroneous and prays for reversal.

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